

Supreme Court, U.S.  
FILED

NOV 1 1991

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(3)  
NO. 91-481

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

VICTOR C. BARIS, et al.,  
*Petitioners,*

v.

CALTEX PETROLEUM, INC., CALTEX  
PETROLEUM CORPORATION, and  
CALTEX OIL CORPORATION,  
*Respondents.*

**PETITIONERS' REPLY MEMORANDUM**

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**QUESTIONS PRESENTED FOR REVIEW**

1. Does lack of removal jurisdiction constitute a “defect in removal procedure” or a substantive jurisdictional defect, which is not subject to waiver for failure to file a motion for remand in 30 days under 28 U.S.C. § 1447(c) (amended Nov. 19, 1988)?
2. Does a federal court’s exercise of admiralty subject matter jurisdiction in a “saving to suitors” case, which is removed without diversity, violate traditional concepts of federalism and rights to trial by jury?

## LIST OF PARTIES

Victor C. Baris  
 Sivirino Carreon  
 Bulig-Bulig Kita Kamaganak Association  
 Renato Asistorga  
 Pedro B. Sorima  
 Arnel N. Galang  
 Elsa Montiagodo  
 Erasto Maghacut  
 Isabel Magno  
 Lorita Acosta Acebedo  
 Violeta Sabulao Faiyaz  
 Julieta Benaso  
 Ecolastica Baldo  
 Jose Baguhin

Petitioners<sup>1</sup>

Caltex Petroleum, Inc.  
 Caltex Petroleum Corporation  
 Caltex Oil Corporation

Respondents

Sulpicio Lines, Inc.  
 Caltex Philippines, Inc.  
 Caltex Asia, Ltd.  
 California Texas Oil Corp.  
 Caltex Philipines Petroleum Company, Inc.  
 Caltex International Limited  
 Caltex International Services Limited  
 Caltex Oceanic Limited  
 Caltex Oil Corp. (Delaware)  
 Caltex Oil Corp. (New York)  
 Caltex Oil Products  
 Caltex (Overseas) Limited  
 Caltex Services (Philippines), Inc.

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1. This action was brought as a class action and also individually by the personal representatives, survivors, and beneficiaries of decedents, all of whom were separately listed in the Notice of Appeal filed in the Fifth Circuit.

Caltex Trading and Transport Corporation  
The Caltex Group  
Caltraport (Far East) Company  
Caltex Investment and Trading Limited  
Caltex Services Corporation  
American Overseas Petroleum Limited  
P.T. Caltex Pacific Indonesia  
Steamship Mutual Underwriting  
Association (Bermuda) Limited  
Vector Shipping Corp.                      Unserved Defendants

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**PETITIONERS' REPLY MEMORANDUM**

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Petitioners, Victor C. Baris, et al, respectfully submit this reply to Respondents' Brief in Opposition.

**I. The Acknowledged Conflict in the Construction of 28 U.S.C. § 1447(c) Is Clear and Substantial.**

Respondents acknowledge that there is a clear circuit conflict on the nationally important issue of removal jurisdiction; yet, Respondents advance three arguments to avoid this Court's resolution of that conflict.

First, Respondents incorrectly maintain that the conflict involves only one vagabond opinion which can be ignored. Second, Respondents maintain that only a "strained con-

struction" would consider a "procedural defect" to mean a "procedural defect." Finally, Respondents maintain that sound policy supports their liberal construction of the removal statute.

Petitioners will address each of these contentions in turn. But, these contentions, in themselves, demonstrate the confusion faced by litigants and courts in the construction of the statute. To not address this confusion now, at a time when the conflict has been sharply drawn, may lead to even greater confusion and increase in the jurisdictional burdens of federal courts.

This is the case and this is the opportunity to resolve this conflict for once and for all.

#### **A. The Conflict Has Sharply Divided at Least Four Circuit Courts of Appeals.**

The conflict here involves more than a lone decision of a "less than pellucid" Third Circuit, as the Respondents contend. The conflict has placed several Circuits at odds.

Both the Third and the Fourth Circuits have held that the requirement that a motion to remand "on the basis of any *defect in removal procedure* must be made within 30 days" applies *only* to procedural defects. *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1213 (3d Cir. 1991); *State v. Ivory*, 906 F.2d 999, 1000 n.1 (4th Cir. 1991); *State of North Carolina v. Cisneros*, 1991 WL 209823, \_\_\_\_ F.2d \_\_\_\_ (4th Cir. Oct. 21, 1991); *see also Air Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989) ("the district court could only remand within 30 days of the filing of notice to remove for procedural defects").

The Fifth Circuit and, for argument's sake, the Seventh Circuit, have held that the phrase "defect in removal procedure" in 28 U.S.C. § 1447(c) should be liberally construed to include not only procedural defects, but also substantive defects, such as here, a federal court's lack of removal jurisdiction. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544-45 (5th Cir. 1991, *cert. pending*); *In re Shell Oil Co.*, 932 F.2d 1518, 1521 (5th Cir. 1991); *In re Shell Oil Co.*, 932 F.2d 1523, 1527 n.6 (5th Cir. 1991); *Western Securities Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991).

This conflict is irreconcilable. Although Respondents acknowledge, as they must, that there is a direct conflict, Respondents seek to downplay this conflict by characterizing the Third Circuit's opinion in *Foster* as an "isolated misreading of a jurisdictional statute by a single court of appeals." Respondents then seek to distinguish the Fourth Circuit's opinion in *State v. Ivory* as a mere restatement of the statutory language. See Brief in Opposition at 13-14.

In *State v. Ivory*, the Fourth Circuit held that the federal court's lack of removal jurisdiction (as a result of insufficient allegations of federal jurisdiction in the removal petition) was not a "procedural defect" and was not waived by failure to file a motion to remand within 30 days of removal. 906 F.2d at 1000 n.1, 1001-03. This very holding was recognized in Judge Phillips' dissent. *Id.* at 1004.

And, this holding was recognized in the Fourth Circuit's most recent opinion on the issue. *State of North Carolina v. Cisneros*, 1991 WL 209823 at 4, \_\_\_\_ F.2d

\_\_\_\_\_(4th Cir. Oct. 21, 1991). Citing *Ivory*, the Fourth Circuit held as an established principle that:

*The lack of federal removal jurisdiction in such cases is not subject to waiver by the state's failure to remove for remand or to attack subject matter jurisdiction at any later stage, but may be noticed by a court at any stage.*

*Id.* (emphasis added).

In the case at bar, the Fifth Circuit held that *the lack of removal jurisdiction* was a "defect in removal procedure" which was waived by the failure to file a motion to remand within 30 days after removal. *Baris*, 932 F.2d at 1545; App. 8-9.

This conflict is real and substantial and cries out for resolution. For this reason, Petitioners ask that certiorari be granted.

#### **B. Respondents' "Strained Construction" Does Not Advance Sound Policy.**

Respondents accuse the Third Circuit (and by implication the Fourth Circuit) of a "strained construction" of the statute which does not square with Respondents' view of sound policy.

The "strained construction," if any there be, is on the part of the Respondents. They seek to liberally expand the phrase "defect in removal procedure" to include every *substantive* defect. They seek to characterize a federal court's lack of removal jurisdiction as a "non-jurisdictional defect." And they argue that Congress' procedural defect language leaves a glaring *casus omissus* that must be filled by an expansive reading of the clear terms.

Such contentions contravene the rules that govern statutory construction. Courts are required to give effect to the plain language of a statute. *Rubin v. United States*, 449 U.S. 424, 430 (1981). A “procedural defect” is not, and cannot be, a substantive defect. *See Foster* 933 F.2d at 1213.

Moreover, removal statutes must be strictly construed against removal. J. Moore & B. Ringle, 1A *Moore’s Federal Practice* ¶0.157[1.3] at 38 (1990) (and cases cited therein). Courts have recognized that Congress does not deal with every *casus omissus* in the removal statutes. *See, e.g., Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 33-34 (2d Cir. 1988) (recognition that there are other grounds for remand not addressed in the former § 1447(c)). Here, Respondents would impose a liberal construction on this removal statute to so transform a procedural defect into a jurisdictional defect that a federal court could acquire jurisdiction where Congress has provided none.

Sound policy does not support such a result. Certainly, Congress provided the procedural defect waiver rule to prohibit diverstiture of jurisdiction based on *de minimis* objections to removal raised long after the case has been litigated. But, a federal court’s lack of removal jurisdiction can hardly be considered a *de minimis* objection. Lack of removal jurisdiction challenges a federal court’s very ability to entertain an action.

Respondents’ construction would transform the concept of federal jurisdiction beyond recognition. “Procedural defect” waivers of substantive federal removal jurisdiction would require federal courts to entertain all actions, even those, as here, where there exists no

colorable basis for removal jurisdiction. Federal courts would be deluged with a flood of state court actions at a time when both Congress and the courts have sought to limit federal jurisdiction.

Only by grant of certiorari can this Court reverse this tide which threatens to overwhelm the federal courts. Petitioners respectfully pray that their petition be granted.

## **II. Congress Has Prohibited Federal Courts from an Exercise of Subject Matter Jurisdiction Over Savings to Suitors Admiralty Cases.**

Without citation of any case law, Respondents merely oppose Petitioners' second question with the proposition that since DOHSA cases can be brought on the admiralty side of a federal court, the case "could have" been filed in federal court—and hence, a federal court can assert original subject matter jurisdiction over the controversy. Respondents have not sought to address the significant conflicts in admiralty jurisdiction raised by the decision below.

Even under Respondent's view, if a federal court's lack of removal jurisdiction can be waived, it is still necessary for the federal court to determine if the court "would have had original jurisdiction of the case had it been filed in that court." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972). To make this determination, the federal court must look at the posture of the case at the time of judgment. *Id.*; *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

At the time of judgment, as at the time the original state court petition was filed, the Petitioners had as-

serted a "saving to suitors" state law action in state court. There is no diversity.

Congress expressly allocated jurisdiction over "saving to suitors" admiralty claims (whether based on 28 U.S.C. § 1333(1) or on § 7 of DOHSA) to state courts. A federal court has no statutory basis upon which to exercise jurisdiction over a "saving to suitors" claim. This is not merely a matter of removal jurisdiction, as the Respondents would contend. Rather, the "saving to suitors" statutes are matters of substantive jurisdiction. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374-75 (1959); *Offshore Logistics, Inc., v. Tallentire*, 477 U.S. 207, 232 (1985).

To now hold that a federal court could acquire subject matter jurisdiction over a "saving to suitors" state law claim would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *Finn*, 341 U.S. at 18.

This case was not brought in admiralty. It was brought in law. This case was not brought under the federal jurisdictional statutes. It was brought under the state jurisdictional statutes.

The federal court below had no statutory basis upon which to acquire original subject matter jurisdiction over this case. To rectify this significant misreading of the admiralty jurisdictional statutes and to prevent further erosion of federalism, Petitioners urge this Court to review this conflict also.

## CONCLUSION

The need for resolution of the sharp conflicts presented here cannot be disputed. This Court should speak with one voice to resolve these important issues, lest the clear lines that separate state and federal jurisdiction become blurred and forgotten. Federal courts and litigants require direction on these issues. Petitioners urge the Court to take advantage of this unique opportunity and to grant this petition to review the questions presented.

Respectfully submitted,

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